Supreme Court, U.S.
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NO. 86-573

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THAN TUN, M.D., and
THIDA SWE TUN,

Petitioners,

vs.

KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN AND CHILDREN'S MEDICAL CENTER, a Hawaii nonprofit corporation; et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF HAWAII

BRIEF IN OPPOSITION OF RESPONDENTS, THE QUEEN'S MEDICAL CENTER, JON PEGG, M.D., DAN YOSHIOKA, M.D., AND ARTHUR SPRAGUE, M.D., TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the issues regarding the dismissal of the Petitioners' claims of alleged violations of 42 U.S.C. Section 1983 and 15 U.S.C. Section 1 are properly before this Court.
2. Whether the Hawaii Supreme Court's ruling regarding the state peer review statute, Section 663-1.7, Haw. Rev. Stat., was based on an independent and adequate nonfederal ground.
3. Assuming that the Petitioners properly raised the alleged violations of 42 U.S.C. Section 1983 and 15 U.S.C. Section 1 before the state courts, do the Petitioners state a claim upon which relief may be granted given this Court's rulings in Rendell-Baker v. Kohn, 457 U.S. 830 (1982) and General Investment Co. v. Lake Shore and Michigan Southern Ry. Co., 260 U.S. 261 (1922).

LIST OF PARTIES

Petitioners are THAN TUN, M.D. and THIDA SWE TUN.

Respondents are KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER, a Hawaii non-profit corporation; KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER; RICHARD DAVI, Individually and as President of Kapiolani Women's and Children's Medical Center; PAUL E. COOK, Individually and as Executive Vice President of Kapiolani Women's and Children's Medical Center; WALTON K.T. SHIM, M.D., Individually and as Chief of Staff of Kapiolani Women's and Children's Medical Center; STANLEY M.K. CHUNG, M.D., Individually and as Chief of Surgery of Kapiolani Women's and Children's Medical Center; THE QUEEN'S MEDICAL CENTER, A Hawaii nonprofit corporation; JON PEGG, M.D., Individually and as Chairman of

Anesthesiology Credentials Committee, The Queen's Medical Center; DAN YOSHIOKA, M.D., Individually and as Chief of Anesthesia, and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; and ARTHUR SPRAGUE, M.D., Individually and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center.

Petitioners' Petition for Writ of Certiorari states that Mitsuo Hattori, M.D. is not a respondent herein.

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_____

Respondents, the Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. respectfully request this Court deny the Petition for Writ of Certiorari, which seeks review of the unpublished Memorandum Opinion of the Supreme Court of Hawaii, filed on June 17, 1986, and reprinted herein as Appendix B. The Judgment on Appeal, entered on August 16, 1986 is reprinted herein as Appendix D.

This Brief in Opposition is submitted on behalf of Respondents the Queen's Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D. and Arthur Sprague, M.D. (hereinafter collectively "Queen's Medical Center"), to the Petition for a Writ of Certiorari filed on behalf of THAN TUN, M.D. and THIDA SWE TUN (hereinafter "Petitioners").

JURISDICTION

This Court does not have jurisdiction to grant Petitioners' Writ of Certiorari under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Hawaii Constitution Art. 1, Section 5; Section 663-1.7. Hawaii Revised Statutes; Rule 56, Hawaii Rules of Civil Procedure; 42 U.S.C. Section 1983; 15 U.S.C. Section 1; Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On or about June 17, 1982, Dr. Than Tun submitted his application for admission to the medical staff of Queen's Medical Center and for clinical privileges in anesthesiology (R. 98-100). (R. refers to Record on Appeal at the designated page, to

be certified by the Clerk of the Hawaii Supreme Court.)

As part of the application process, Dr. Tun received a printed copy of the Queen's Medical Center's Constitution and By-laws of the Medical and Dental Staff ("By-laws"). On June 15, 1982, Dr. Tun signed an acknowledgment that he was in receipt of said By-laws and that he agreed to be bound by the terms provisions of the rules and regulations of the Queen's Medical Center's medical and dental staff (R.98).

Dr. Tun was granted temporary clinical privileges in anesthesiology with observation for a one-month period beginning on June 18, 1982 (R. 89). According to the Queen's Medical Center's Constitution and By-laws, the granting of temporary clinical privileges did not confer staff membership on Dr. Tun. (R. 99).

Temporary clinical privileges were granted Dr. Tun in thirty-day increments

while Queen's Medical Center continued to process his application. Each thirty day privilege period was subject to review, evaluation and approval before it was extended (R. 90).

Dr. Tun was granted temporary privileges without observation for the following periods:

July 12, 1982 to August 10, 1982

August 11, 1982 to September 9, 1982

September 3, 1982 to October 2, 1982

October 3, 1982 to November 1, 1982

(R. 90)

As part of the peer review process, Queen's Medical Center conducted an investigation of the applicants' character, qualification and standing in the medical profession. Dr. Tun authorized Queen's Medical Center to make such an inquiry at other local medical facilities, licensing agencies, professional associations and medical practitioners who had information

regarding Dr. Tun's professional qualifications, clinical competence and moral and ethical character (R. 100).

Dr. Tun agreed to release from liability all representatives of Queen's Medical Center and/or its medical-dental staff for actions taken in good faith and without malice in connection with the evaluation of Dr. Tun's application, credentials and qualifications (R.100).

As part of Queen's Medical Center's review process, a questionnaire was mailed to all physicians at Queen's Medical Center in September, 1982. Dr. Tun also received said questionnaire (R. 101).

On his completed questionnaire, dated September 27, 1982, Dr. Tun indicated that he had no suspensions, restrictions, revocations or denial of privileges at any hospital (R. 101).

On October 22, 1982, as part of the routine request to area hospitals for

information regarding Dr. Tun, Kapiolani Children's Hospital ("Kapiolani") responded to Queen's Medical Center's request.

Kapiolani's report stated that Dr. Tun's application for provisional privileges at Kapiolani was denied following the termination of his temporary privileges granted for the June 23, 1982 to July 9, 1982 period.

Kapiolani's response to Queen's Medical Center's inquiry indicated that Dr. Tun's application for provisional privileges at that hospital was rejected following the termination of temporary privileges on July 9, 1982. Kapiolani's response further indicated that Dr. Tun had not satisfactorily completed Kapiolani's observation-probation requirements. The Kapiolani evaluator concluded that, "I don't believe Dr. Tun is ready to give anesthesia

for children unless he seeks further training in the field of pediatric anesthesiology". (R. 102).

Following the receipt of the Kapiolani evaluation and during Queen's Medical Center's continued processing of his application, Dr. Tun, on October 29, 1982, was granted temporary clinical privileges at Queen's Medical Center on the following conditions for the period October 20, 1982 through November 29, 1982:

> Anesthesiology for adult cases, without observation. Anesthesiology for newborn and pediatric cases, with observation.

The temporary privileges were granted Dr. Tun for the following periods:

November 30, 1982 to December 29, 1982

December 30, 1982 to January 29, 1983

(R. 92).

On January 28, 1983, Queen's Medical Center was informed that Dr. Tun had retained an attorney to represent him in

regard to his application for privileges. Dr. Tun confirmed this action by letter received on February 14, 1983 (R. 103).

Queen's Medical Center continued to process Dr. Tun's application. Dr. Tun was granted temporary clinical privileges limited to anesthesiology for adult cases, without observation for the following periods:

January 30, 1983 to March 2, 1983

March 31, 1983 to April 1, 1983

April 2, 1983 to May 1, 1983

(R. 92, 93)

Dr. Tun was notified on April 4, 1983, by certified mail that Queen's Medical Center's Anesthesiology Credentials Committee had met to review his application for staff membership and clinical privileges in anesthesiology. (R. 105-108).

Dr. Tun was advised in said letter of April 4, 1983 that following an evaluation of the information contained in his file, the Anesthesiology Credentials Committee

recommended that his application be approved on the following basis:

1. Anesthesiology for adult cases, without observation.

2. Anesthesiology for pediatric cases (under age 10), with observation, for a minimum of two cases at the Medical Center involving the use of the general inhalational anesthetic technique.

3. Provisional staff membership status, anesthesiology service

The Credentials Committee went on to observe:

> The above recommendation for anesthesiology for adult cases, without observation, is based on your satisfactory completion of observation requirements for cases at Queen's Medical Center involving anesthesiology for adults.
>
> It was recommended that your privileges for anesthesiology for pediatric cases (under age 10) be granted with observation based on documentation received which raises questions to your being granted clinical privileges without observation in anesthesiology for the above-described pediatric cases at this time.

(R. 105).

Dr. Tun was advised in the letter that he had a right to meet with the Anesthesiology Credentials Committee. The letter declared:

> The recommendation of the Anesthesiology Committee, if approved, would be less than that for which you have made application and is, therefore, considered an adverse recommendation. As such, in accordance with our due process procedures, this is to notify you of your opportunity to meet with the Credentials Committee for mutual discussion and review of the basis upon which the above recommendation was made, prior to finalization.

(R. 105) (emphasis supplied).

Dr. Tun's right to convene an informal hearing with the Anesthesiology Credentials Committee was provided for in Chapter 1, Section A, 1.02(c) of the By-laws (R. 104):

> c. If an adverse recommendation is made by a Credentials Committee, an informal meeting shall be scheduled by the Credentials Committee to meet with the applicant, if the applicant so desires, during which the applicant shall be informed of the reasons for the adverse recommendation.

Attached to the Queen's Medical Center's April 4, 1983 letter to Dr. Tun was a form letter which Dr. Tun could use to request a hearing before the Credentials Committee. (R. 108).

Dr. Tun availed himself of the opportunity to meet with the Anesthesiology Credentials Committee and a hearing was scheduled for October 4, 1983 (R. 93).

Following the October 4, 1983 meeting and subsequent clarifying correspondence with Dr. Tun, the Anesthesiology Credentials Committee recommended that Dr. Tun's application for privileges be denied (R. 93-94). Dr. Tun was notified of the adverse recommendation (R. 145).

Queen's Medical Center's Medical Executive Committee, the 27 member reviewing committee composed of 1 anesthesiologist and representatives of 26 other departments or services, met on February 2, 1984 and

reviewed Dr. Tun's application for privileges (R. 110).

The Medical Executive Committee notified Dr. Tun on February 21, 1984 of its decision to accept the recommendation of the Anesthesiology Credentials Committee, that Dr. Tun's application be denied based on serious questions regarding his ethical conduct in responding to Queen's Medical Center's September, 1982 questionnaire.

Dr. Tun was advised in the February 21, 1984 letter that in accordance with Section A, Chapter I of the By-laws (R.109), that he had the right to request an informal hearing with the Medical Executive Committee (R. 110).

Dr. Tun requested such a meeting with the Medical Executive Committee. After several scheduling delays requested by Dr. Tun, Dr. Tun's hearing with the Medical Executive Committee was eventually scheduled for October 30, 1984. (R. 95).

Notice of Dr. Tun's hearing before the Medical Executive Committee was sent to Dr. Tun by certified mail on October 5, 1984 (R. 113).

Dr. Tun was advised in said October 5, 1984 letter that:

> After the informal hearing the Medical Executive Committee will make a recommendation to the Queen's Medical Center's Board of Directors. If that recommendation following such informal hearing is still adverse you will be entitled to a full hearing by the Board of Directors before the Board of Directors makes a final decision on the matter. See section 1.07 of the Bylaws.

(R. 113, 114).

Rather than proceed with Queen's Medical Center's peer review process, Dr. Tun did not attend the requested October 30, 1984 hearing of the Medical Executive Committee.

On November 9, 1984, Dr. Tun was advised by certified mail that he had a right to a full hearing before the Board of Directors.

While Dr. Tun's application was proceeding through Queen's Medical Center's review process, Dr. Tun and his wife filed their Complaint in the Circuit Court of the First Circuit. On August 22, 1984, the First Amended Complaint was filed.

Concurrently with the filing in the state court, the Petitioners filed a complaint in the United States District Court for the District of Hawaii on August 10, 1984, The federal action was dismissed with prejudice by the Petitioners on December 10, 1984.

Queen's Medical Center moved for summary judgment and dismissal in the state court action, and Judge Frank Takau granted said Motion to Dismiss on December 6, 1984 (Appendix A, "Order Granting Defendants' Queen's Medical Center Medical Center, Jon Pegg, M.D., Dan Yoshioka, M.D., and Arthur Sprague, M.D's Motion to Dismiss Complaint for Failure to State a Claim upon Which

Relief Can Be Granted"). The Petitioners appealed the Circuit Court's ruling to the Hawaii Supreme Court. On June 17, 1986, the Hawaii Supreme Court sustained the Circuit Court's Order granting Queen's Medical Center's Motion to Dismiss. (Appendix B, "Unpublished Memorandum Opinion of Hawaii Supreme Court"). The Petitioners' Motion for Reconsideration was denied by the Hawaii Supreme Court on July 7, 1986. (Appendix C, "Order") and the Judgment on Appeal was entered on August 16, 1986 (Appendix D, "Judgment on Appeal").

I. REASONS FOR DENYING THE PETITIONERS' WRIT OF CERTIORARI

The Petitioners' Writ of Certiorari presents no substantial federal question for this Court's review. The issues regarding the Petitioners' 42 U.S.C. Section 1983 (civil rights) and 15 U.S.C. Section 1 (antitrust) claims are not properly before

this Court because (1) as to the Petitioners' federal antitrust claim, the Hawaii state courts have no jurisdiction, and (2) the Petitioners never "pressed" nor did the state courts "pass" upon the issues raised in the Writ of Certiorari. With respect to the Petitioners' claims regarding the state peer review statute, Section 663-1.7, Haw. Rev. Stat. (Appendix H), and the exhaustion of administrative remedies, the Hawaii Supreme Court's rulings on those claims were based on independent and adequate state grounds.

A. This Court Lacks Jurisdiction To Adjudicate This Appeal Because The Petitioners Failed To "Press" And the State Courts Did Not "Pass" Upon The Issues Raised In The Petition For Writ Of Certiorari

This Court has maintained that its jurisdiction over decisions from state courts derives from 28 U.S.C. Section 1257. In McGoldrick v. Compagnie Generale, 309 U.S. 430, 434-5 (1940), this Court set forth its

policy with respect to exercising its appellate jurisdiction in cases coming from the federal courts. In McGoldrick v. Compagnie Generale, supra, the Court declared that it would not consider questions raised by petitioners' writ of certiorari "not pressed or passed upon in the courts below."

In cases coming from state courts in which a state statute is challenged as unconstitutional, this Court has maintained the policy that it will desist from deciding questions not presented or decided in the state supreme court. Where the constitutionality of a state statute has been upheld by the highest state court, the Supreme Court has refused to consider any grounds of attack not raised or decided in the state supreme court.

In Illinois v. Gates, 462 U.S. 213 (1983), this Court noted that it had:

> held early on that Section 25 of the Judiciary Act of 1789 furnished

> us with no jurisdiction unless a federal question had been both raised and decided in the state court below. As Justice Story wrote in Crowell v. Rendell, 10 Pet. 368, 391, 9 L.Ed. 458 (1836), 'If both of these requirements do not appear on the record, the appellate jurisdiction fails.'

The then Justice, now Chief Justice Rehnquist observed in Illinois v. Gates at 462 U.S. 218, n.1, that the strict rule of Crowell v. Rendell, supra, that the federal question had to be both raised and decided in the state court below, was later modified so that this Court would not consider a claim unless it had been either raised or squarely considered and resolved in the state court proceedings. Last term, in Heath v. Alabama, ___ U.S. ___, 106 S.Ct. 433, 436-37 (1986), this Court declined to decide an issue because the petitioner failed to claim lack of jurisdiction in his petition to the Alabama Supreme Court and raised the claim for the first time in his petition to this Court. Justice O'Connor found that:

> [e]ven if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court,...the longstanding rule that this court will not consider such claims creates, at the least, a weighty presumption against review

Ibid, pp. 436-37. (citations omitted).

In the case at bar, the Petitioners failed to raise or argue the 42 U.S.C. Section 1983 (civil rights) and 15 U.S.C. Section 1 (antitrust) claims in the state courts and now raise these issues for the first time in this Court. Most of the issues raised by the Petitioners' Writ of Certiorari, including the requirement of exhaustion of administrative remedies in the context of a 42 U.S.C. Section 1983 action (i.e., Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)); the proper standard of review for an order of dismissal or summary judgment in the context of a 42 U.S.C. Section 1983 claim; or the alleged bias of

the peer review process at Queen's Medical Center, were not presented, pressed or passed upon in the state court litigation. It was only in the Writ of Certoriari that the Petitioners first raised these federal law issues. Since none of the federal issues now raised by the Petitioners, and specified below, were raised, briefed or decided in the Hawaii Supreme Court, this Court should deny the Petitioners' Writ of Certiorari under the doctrine of Crowell v. Rendell, supra, Illinois v. Gates, supra; and Heath v. Alabama, supra.

B. The Rulings of the Hawaii Supreme Court Rest Upon Independent and Adequate State Grounds

All of the issues properly raised by the Petitioners in the state circuit court or Hawaii Supreme Court, were disposed of by the Hawaii Supreme Court on independent and adequate state grounds and raise no federal questions reviewable by this Court. It is a

longstanding principle of adjudication that this Court will not review a state court judgment which rests upon two grounds, one federal and the other nonfederal, if the nonfederal basis is independent of the federal ground and adequate to support the state court judgment. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 489 (1965); Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 164 (1917).

The Petitioners have alleged, inter alia, that the Hawaii state courts employed an improper procedural or evidentiary standard in reviewing Queen's Medical Center's Motion for Dismissal. However, in reviewing the Petitioners' argument with respect to the evidence proffered by the Petitioners, in opposition to Queen's Medical Center's Motion to Dismiss, and the failure to accord the Petitioners' due process, the Hawaii Supreme Court relied upon independent

and adequate nonfederal grounds as the basis for their ruling. The Petitioners' due process contentions were acknowledged, recognized and reviewed by the Hawaii Supreme Court. See, Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972) cert. denied, 409 U.S. 1048 (1972), reh. denied, 409 U.S. 1131 (1973) and Appendix B-9. The Petitioners did not cite nor rely upon the Federal Constitution in their pursuit of their due process claim in the Hawaii Supreme Court. The Hawaii Supreme Court's reliance upon Silver v. Castle Memorial Hospital, supra, evidences the independent and adequate nonfederal basis for that Court's ruling that the Petitioners were not deprived of their due process rights under Article I, Section 5 of the Hawaii State Constitution.

The Petitioners refer this Court to decisions relating to their 42 U.S.C. Section 1983 and 15 U.S.C. Section 1 claims to

support their contention that the Hawaii state courts used an improper evidentiary standard in determining whether there was "a genuine issue of material fact" under Rule 56, Hawaii Rules of Civil Procedure (Appendix G).

Queen's Medical Center contends (1) that these purported federal issues, the 42 U.S.C. Section 1983 and federal due process claims, were neither "pressed nor passed upon" by the state courts; (2) the Petitioners did not press their alleged 42 U.S.C. Section 1983 civil rights claims in the state courts; (3) the Petitioners did not, and could not, press their federal antitrust claims in the state courts, and any ruling on the Petitioners' state antitrust claims was based on independent and adequate nonfederal grounds; (4) the Petitioners' claims that the peer review process was constituionally defective because of "bias" on the part of the Queen's Medical Center

personnel was never raised, argued or ruled upon by the Hawaii Supreme Court; and (5) the disposition of the Petitioners' claims with respect to Section 663-1.7, Haw. Rev. Stat. (Appendix H), and the Hawaii Supreme Court ruling on that issue, rested on independent and adquate nonfederal grounds and hence is not now reviewable by this Court.

1. The Petitioners Do Not Have a 42 U.S.C. Section 1983 Action as to Actions and Decisions of the Queen's Medical Center

The Petitioners' claim that the peer review process of Queen's Medical Center violated their federal civil rights, 42 U.S.C. Section 1983. The Petitioners assert that the action of Queen's Medical Center is "state action" and hence all decisions and actions of the institution are subject to the due process requirements of the Fourteenth Amendment to the United States Constitution and any violation of the federal due process

requirements subjects Queen's Medical Center to 42 U.S.C. Section 1983 liability. The Petitioners' attempt to support their contention that the acts of Queen's Medical Center are "acts of the state" on the grounds that the Queen's Medical Center receives Hill-Burton funds, as well as federal and state funds under Medicare/Medicaid programs and state and federal tax exemptions as a non-profit private hospital. (Petitioners' Writ of Certiorari, pp. 44-46). Citing various cases, the Petitioners conclude that the receipt of Hill-Burton funds and participation by the states through the grant of tax exempt status constitutes "state action" or involvement sufficient to subject Queen's Medical Center to the due process requirements of the Fourteenth Amendment and 42 U.S.C. Section 1983 liability for any violation of a claimant's due process rights.

However, in reaching the conclusion that the receipt of federal funds and the granting of tax exempt status subject Queen's Medical Center to the requirements of the Fourteenth Amendment and Section 1983 liability, the Petitioners failed to consider Rendell-Baker v. Kohn, 457 U.S. 830 (1982). In Rendell-Baker v. Kohn, supra, this Court held that the petitioner's discharge by a private school, which received federal funds, did not make the school's employee-discharge decisions acts of the "state" for purposes of 42 U.S.C. Section 1983 liability. Using the test developed in Blum v. Yaretsky, 457 U.S. 991 (1982), this Court concluded that the school was not fundamentally different from many private corporations whose business depended primarily on government contracts and whose acts did not become acts of the state by reason of the significance or even total engagement in performing public contracts. The school's decision to

discharge the petitioners was not compelled or even influenced by any state regulation and the fact that the school performed a public function in educating maladjusted high school students did not, according to this Court, make the school's acts "state action". Finding no "symbiotic relationship" between the school and the state as the Court found in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court concluded that the discharged employees did not have a 42 U.S.C. Section 1983 claim against the school based on the financial relationship between the private organization and the government. Rendell-Baker v. Kohn, 457 U.S. at 843.

The Petitioners' "state action" claim appears for the first time in their Petition for a Writ of Certiorari and was never "pressed" nor "passed" upon by the Hawaii Supreme Court. Had the Petitioners raised the "state action" issue in a timely

fashion in the state courts, the issue might be reviewable by this Court. Failing to raise the 42 U.S.C. Section 1983 claim in the state courts, the Petitioners cannot now raise it for the first time in this Court through a petition for writ of certiorari.

Even if we assume, en arguendo, that Queen's Medical Center was subject to the Fourteenth Amendment and Section 1983 liability for violating the Petitioners' civil rights, this Court has never held that a state court must entertain a Section 1983 action, See Martinez v. California, 444 U.S. 277, 283-84, n.7, and if a state court does entertain such federal actions, the state court may employ its own procedural rules. In fact, the general rule is that where a state court accepts jurisdiction over a claim based on federal rights, the federal matter must be presented to the state courts in accordance with the requirements of the state's procedural rules. As this Court

has often said, state law and practice "are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law". John v. Paullin, 231 U.S. 583, 585 (1913); Wolfe v. State of North Carolina, 364 U.S. 177, 194-95 (1960); New Jersey v. Potash, 440 U.S. 450, 455 (1979). Thus even if the Petitioners had properly raised the 42 U.S.C. Section 1983 claim in the state courts, the Hawaii Supreme Court was justified in using the state procedural standards for determining whether the adverse or non-moving party, the Petitioners herein, set forth specific facts showing that there was a genuine issue for trial. That determination is a procedural issue which is a matter for the forum court and does not raise a reviewable federal issue. 1/

1/ The Petitioners have not raised the issue that the Hawaii Rules of Civil

2. The Petitioners Did Not, As A Matter Of Law, Have a Federal Antitrust Claim

The Petitioners also contend that the Hawaii Supreme Court improperly sustained the trial court's order of dismissal on the Petitioners' federal antitrust claim. (Petitioners' Writ of Certiorari pp. 35-36). Queen's Medical Center submits that the dismissal of the Petitioner's antitrust claim does not raise any federal question

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1/ (cont'd)

Procedure eviscerate the interests or policy of the federal statute. Cf. Dice v. Akron Canton & Youngstown Railroad, 342 U.S. 359 (1952); Brown v. Western Railway, 338 U.S. 294 (1949) (Federal Employers' Liability Act cases involving state procedural rules). The Petitioners seem to argue that the Hawaii state courts were required to use the federal standards for granting or denying a motion to dismiss or summary judgment. In any event, the standards of Rule 56, Haw. R. Civ. P. would appear consistent with this Court's latest rulings on motions for summary disposition of complex cases. Cf. Anderson v. Liberty Lobby, Inc., ___ U.S. ___, 106 S. Ct. 2505 (1986); Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 1548 (1986).

sufficient to invoke the appellate jurisdiction of this Court because: (1) the Hawaii state courts did not have jurisdiction to hear and determine a Sherman Act antitrust claim, 15 U.S.C. Section 1; (2) the issue related to the federal antitrust claim was neither "pressed or passed upon" in the state court proceedings; and (3) the Hawaii Supreme Court's disposition of the Petitioners' state treble-damage antitrust claim, Chapter 480, et. seq., Haw. Rev. Stat., on the ground that the pleadings and record did not raise a genuine issue of material fact, rested on an interpretation of state law, which is not reviewable by this Court.

At page 36 of the Writ of Certiorari, the Petitioners assert that the state court First Amended Complaint of August 22, 1984 alleged violations of the Sherman Antitrust Act. The First Amended Complaint charged Queen's Medical Center with certain violations of the antitrust laws.

From this the Petitioners, referencing Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); White Motor Company v. United States, 372 U.S. 253 (1963) and other cases cited at the Writ of Certiorari, pages 35-38, conclude that the state court improperly granted Queen's Medical Center's Motion for Dismissal. This discussion and the precedents cited therein might have been material and relevant if the Petitioners were appealing a federal court's dismissal of their federal antitrust claims. However, the Petitioners' federal claims were voluntarily dismissed with prejudice in the federal court. 2/ (Appendix E). Given the

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2/ The Petitioners' federal court Complaint alleging the Queen's Medical Center's violation of the Sherman Act was dismissed with prejudice by the petitioners on December 10, 1984. The only antitrust claims that could have been "pressed and passed

longstanding precedents of this Court, the Hawaii state courts had no jurisdiction to hear and determine the Petitioners' federal treble damage action. In fact, since 1922 this Court has held that the federal courts have the exclusive jurisdiction over any and all Sherman Act claims. General Investment Co. v. Lake Shore and Michigan Southern Ry Co., 260 U.S. 261 (1922).

The Petitioners could not, as a matter of law, have adjudicated their Sherman Act claims in the Hawaii state courts because there was no subject matter jurisdiction over their "federal antitrust claim" in the state Circuit Court or Hawaii Supreme Court. Thus

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2/ (cont'd)

upon" by the Hawaii Supreme Court were the Petitioners' state antitrust claims, Chapter 480, Haw. Rev. Stat., which do not raise a federal question sufficient to invoke appellate the jurisdiction of this Court.

the Petitioners' argument that the Hawaii state courts employed an improper evidentiary standard in granting Queen's Medical Center's dismissal of the Petitioners' federal antitrust claims is legally irrelevant and immaterial because the Hawaii state courts never had, as a matter of law, subject matter jurisdiction over the Petitioners' federal antitrust claims.

For purposes of argument, even if the Petitioners could have lawfully brought their Sherman Act claims in the Hawaii state courts, this Court has held that summary disposition is not inappropriate in complex antitrust cases and the federal courts properly applying Rule 56 would not be reversed by this Court. Matsushita Electric Industrial Co. v. Zenith Radio, ___ U.S. ___ 106 S. Ct. 1348, 1355-57 (1986).

Thus, even if the Petitioners could have brought their federal antitrust claim in the Hawaii state courts, this Court would

have required the Petitioners to do more than simply show that there is some "metaphysical doubt" as to the material facts embodied in the First Amended Complaint. In the language of Rule 56, Fed. R. Civ. P., this Court observed that the non-moving party must come forward with:

> Specific facts showing that there is a genuine issue for trial...Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'.

Ibid, 106 S. Ct. 1356.

It would appear that the Petitioners' arguments with respect to the federal antitrust claim are therefore frivilous. First, the Petitioners could not, as a matter of law, have brought their federal Sherman Act claims against Queen's Medical Center in the state court because the federal courts have exclusive jurisdiction over such actions and the state court was without subject matter jurisdiction to hear

and determine any federal antitrust claims. Second, even if this Court reversed its long-standing rule of General Investment Co. v. Lake Shore and Michigan Southern Ry Co., supra, and held that a state court had concurrent jurisdiction with the federal courts to adjudicate federal treble-damage antitrust claims, a state court's order of dismissal or summary judgment, where the opposing party could do nothing more than show "some metaphysical doubt as to the material facts" and the non-moving party could not come forward with "specific facts showing that there is a genuine issue for trial" is consistent with the most recent rulings of this Court in reviewing summary dispositions in antitrust cases.

As to the Petitioners' state antitrust claims, which were the only valid antitrust claims before the Hawaii state courts, Queen's Medical Center submits that the Hawaii Supreme Court's standard for a

granting or denying a motion to dismiss is non-reviewable through this Court's appellate jurisdiction. This Court has no appellate jurisdiction to review a state supreme court's interpretation of a state's antitrust law, including the state court's standards for determining whether a motion to dismiss or summary judgment was appropriately granted.

Queen's Medical Center concludes that the Petitioners have not raised an appealable or reviewable issue of federal law because (1) under the latest rulings of this Court, there was no "state action" by Queen's Medical Center sufficient to allow the Petitioners to invoke the protections of the Fourteenth Amendment and 42 U.S.C. Section 1983, and (2) the Petitioners could not have brought their federal treble-damage antitrust action in the Hawaii state courts and the federal standards for granting or denying summary dispositions in the antitrust

context are legally immaterial and irrelevant.

C. The Issue of Exhaustion of Administrative Remedies is a Matter of State Law

In the case at bar, the Petitioners contend, inter alia, that they were not required to continue or exhaust their administrative remedies incorporated in the Queen's Medical Center's peer review process where (1) they were suing members of the Peer Review Committee in tort and contract; (2) the physician-applicant determines that continuing the peer review process would be futile; (3) the physician alleges a violation of 42 U.S.C. Section 1983; and (4) the peer review panel is "biased" against the applicant.

1. The Hawaii Supreme Court Properly Disposed Of The Petitioners' Claim That The Continuation With The Peer Review Process Would Be Futile

The Hawaii Supreme Court disposed of the Petitioners' argument that they were not required to exhaust their administrative remedies at Queen's Medical Center on independent and adequate state grounds. (Appendix B).

The Hawaii Supreme Court found that in the usual case a physician-applicant for staff privileges must exhaust available internal administrative remedies afforded by a hospital before abandoning the administrative process and initiating judical action. However, the Hawaii Supreme Court recognized two situations where the exhaustion of remedies requirement has been excused because (a) the administrative review process is either inadequate or (b) the

continuation would be futile and there was certainty of an adverse decision.

The Petitioners have not claimed that the Medical Center's three-step review process, including the Anesthesiology Credentials Committee, the Medical Executive Committee and Board of Directors, was inadequate or that the internal review and appellate procedure deprived the Petitioners or other applicants of their due process rights.

The Petitioners rely on the recognized line of cases which excuse the exhaustion requirement where the continuation of the process would be futile. While the Hawaii Supreme Court also recognized the Petitioners' existence of the doctrine of "futility", that court concluded that the Petitioners:

> failed to show by any supporting evidence on the record specifically how or why such an appeal process would have been futile, or how Queen's Medical Center had already prejudged Dr. Tun. Dr. Tun's personal inclination or views are

> insufficient grounds to support [Dr. Tun's] contentions.

(Appendix B-8)

As in any summary dismissal ruling, the trial court must determine if there are any material issues of fact that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. As this Court said in Anderson v. Liberty Lobby, Inc.:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson v. Liberty Lobby, Inc., 106 S.Ct. at 2512.

In the case at bar, the State Supreme Court found that the Petitioners failed to show "by any supporting evidence on the record specifically how or why such an appeal process would have been futile or how Queen's Medical Center had already prejudged Dr. Tun. Dr. Tun's personal inclination or

views are insufficient grounds to support [Dr. Tun's] contentions."

As to the Petitioner's right to abandon Queen's Medical Center's peer review process before its completion, the Hawaii Supreme Court found that the issues relating to the tort and contract claims should have been raised and argued before the Medical Executive Committee, the appellate forum for decisions of the Anesthesiology Credentials Committee and the Board of Directors, which reviews decisions of the Medical Executive Committee.

In the Hawaii Supreme Court, the Petitioners argued the issue of "futility" and their right to abandon the Queen's Medical Center's peer review process. That court disposed of the claims adversely to the Petitioners. Since there were independent nonfederal and adequate state grounds to dismiss the Petitioners' claim that they were not required to exhaust Queen's Medical

Center's administrative process before initiating legal action in the state court, this Court does not have appellate jurisdiction over the issue. No federal issue is raised by the state court's determination that the Petitioners failed to proffer sufficient evidence on the record to create a genuine issue of material fact that the continuation with the Queen's Medical Center's peer review process was futile.

The Petitioners refer the Court to Qasem v. Kozarek, 716 F.2d 1172 (7th Cir. 1983), for the proposition that the Petitioners were not required to exhaust their administrative remedies before initiating litigation against certain members of the Queen's Medical Center's Anesthesiology Credentials Committee for tort and contract damages.

Even assuming that the Hawaii state courts were compelled to follow Qasem v. Kozarek, Qasem v. Kozarek is clearly

distinguishable from the case at bar. The physician in Qasem v. Kozarek did not seek reinstatement of his hospital privileges, but exclusively pursued a claim for monetary damages. In the case at bar, the Petitioners have requested equitable relief seeking reinstatement and privileges, as well as money damages. In Qasem v. Kozarek, the physician terminated and abandoned any effort to seek privileges at the hospital and was in no way concerned with the outcome of the peer review process. Here, the Petitioners seek both reinstatement and monetary damages, relief which was precluded in Qasem v. Kozarek, 716 F.2d at 1175.

2. The Petitioners Neither Raised Nor Pressed The Issue That They Need Not Exhaust Administrative Remedies Before Filing a 42 U.S.C. Section 1983 Claim

The Petitioners cite this Court to Patsy v. Florida Board of Regents, 457 U.S.

496 (1982) for the proposition that Dr. Tun did not have to exhaust Queen's Medical Center's peer review process before filing their state court Complaint seeking recovery pursuant to 42 U.S.C. Section 1983. Even if we assume that the Petitioners had a valid 42 U.S.C. Section 1983 claim against Queen's Medical Center, the Petitioners never raised, briefed or argued the Patsy v. Florida Board of Regents issue in the Hawaii Supreme Court. In none of the proceedings in the state court did the Petitioners press or the court pass upon the contention that a 42 U.S.C. Section 1983 complainant need not exhaust its administrative remedies prior to commencing judicial action to vindicate their federal civil rights. Had the Petitioners raised the Patsy v. Florida Board of Regents doctrine in the state court system and the issue was decided adversely to Petitioners, then the Petitioners might have arguably been

able to raise that matter in this Petition for a Writ of Certiorari.

Queen's Medical Center contends that under Rendell-Baker v. Kohn, supra, Queen's Medical Center is not a "state instrumentality" and therefore is not subject to the Fourteenth Amendment. Absent any "state action", the Petitioners have no 42 U.S.C. Section 1983 claim against Queen's Medical Center. Had the Petitioners raised their 42 U.S.C. Section 1983 claim in the state courts and argued the effect of Patsy v. Florida Board of Regents on the peer review process, Queen's Medical Center would have had an opportunity to argue in the state courts the fact that Queen's Medical Center was not subject to the requirements of 42 U.S.C. Section 1983. Queen's Medical Center was deprived of advancing those arguments which preclude the filing of a 42 U.S.C. Section 1983 claim against Queen's Medical Center because the Patsy v. Florida Board of

Regents doctrine was never raised, briefed or decided in the courts below. As the case now stands, the Petitioners' failure to raise or press the Patsy v. Florida Board of Regents, doctrine in the Hawaii Supreme Court, or any lower court, deprives this Court of any appellate jurisdiction pursuant to Crowell v. Rendell, supra. The issue cannot now be raised by way of Certiorari in this Court.

3. There Was No Bias In The Queen's Medical Center Peer Review Process

The Petitioners also refer this Court to Gibson v. Berryhill, 411 U.S. 564 (1973) to support their contention that (1) the Anesthesiology Credentials Committee (2) the Medical Executive Committee and (3) the Board of Directors were fundamentally biased against the Petitioners and that any decision rendered by the Queen's Medical Center's peer review committees was constitutionally defective. The Petitioners' arguments are

unpersuasive on two grounds. First, the Petitioners never raised the Gibson v. Berryhill issue in the state courts. Second, unlike Gibson v. Berryhill, the Queen's Medical Center's review process contains adequate protections to guard against prejudice and protect the applicant from bias.

In Gibson v. Berryhill, supra, this Court found that salaried optometrists, not members of the state optometric association, who were charged with unprofessional conduct because of their employment by a corporation, were discriminated against by the state optometric board. This Court determined that the:

> aim of the [state optometric] Board was to revoke the licenses of all optometrists in the State who were employed by business corporations ...and that these optometrists accounted for nearly half of all the optometrists practicing in Alabama. Because the Board of Optometry was composed solely of optometrists in private practice for their own account, the District Court concluded that success in the

> Board's effort [to expel all optometrists employed by corporations] would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified from hearing the charges filed against the [corporate optometrists].

Ibid at 578.

Based on Gibson v. Berryhill, the Petitioners herein claim that the peer review process at Queen's Medical Center was fundamentally flawed and biased because all of the participating physicians had a personal financial interest in excluding the Petitioners from practicing at Queen's Medical Center.

The Petitioners fail to acknowledge a critical distinction between Gibson v. Berryhill and the case at bar. In Gibson v. Berryhill, the single state optometric board was found constitutionally defective because the members of the board would have personally and financially benefited from the

mass expulsion of their actual or potential competitors. However, in the case at bar, Queen's Medical Center peer review process not only had an Anesthesiology Credential Committee composed of anesthesiologists who might have competed with the Petitioners, the review system also provided for a Medical Executive Committee composed of 27 voting members, drawn from all of the Queen's Medical Center's departments or services. Only 1 anesthesiologist serves on the Medical Examination Committee. The By-laws provide for the appeal of any decision of the Medical Executive Committee to the Board of Directors, which has 24 members and only 1 physician, the chief of staff. 3/ The Board

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3/ Had the Petitioners raised the Gibson v. Berryhill issue in the state court proceedings, Queen's Medical Center would have introduced the above-cited evidence as to the composition of the Medical Executive Committee and Board of Directors as of 1984, the relevant time period. The failure of the

of Directors is composed of lay persons, who have no personal or financial interest in the Petitioners' denial of staff privileges. Thus, in the case of Queen's Medical Center's peer review process, unlike Gibson v. Berryhill, there were not one, but three reviewing boards and two of the panels, the Medical Executive Committee except for the one anesthesiologist, and the Board of Directors, had no competitive involvement with the Petitioners or anesthesiology.

Again, the Respondents draw this Court's attention to the fact that in the state court proceedings, the Petitioners did

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3/ (cont'd)

Petitioners to raise the Gibson v. Berryhill issue in the state court substantially prejudices Queen's Medical Center because evidence was readily available to counter the Petitioners' Gibson v. Berryhill arguments of bias. (See Appendices I for the composition of the Queen's Medical Center Medical Executive Committee in 1984 and the Board of Directors in 1984, respectively.)

not raise nor press the Gibson v. Berryhill issue of the alleged constitutional defect and bias of the peer review process at Queen's Medical Center, even though this could have been briefed and argued in the state court proceedings.

4. The Anesthesiology Credentials Committee Did Not Engage in a Concerted Refusal to Deal

The Petitioners also refer this Court to Weiss v. York Hospital, 745 F.2d 786 (3rd Cir., 1984) for the proposition that the denial of privileges to Dr. Tun "was equivalent to a concerted refusal to deal with him, rendering their decisions and actions illegal per se under the Sherman Antitrust Act" (Petitioners' Writ of Certiorari, p. 54). Since this Court has long held that federal courts have the exclusive jurisdiction over Sherman Act cases, the Petitioner could not have brought

the federal antitrust action in the Hawaii state courts.

Again, assuming for purposes of argument, that the Petitioners properly plead a violation of Chapter 480, Haw. Rev. Stat., (state antitrust laws), the Hawaii Supreme Court's disposition of that state claim rests on an independent and adequate state grounds and is final as to any interpretation of the state antitrust law.

5. The Petitioners Failed to Establish a Genuine Issue of Material Fact on the Question of "Qualified Immunity

The Petitioners recognize that the opinions of Hawaii Supreme Court's have held that Section 663-1.7, Haw. Rev. Stat., grants a qualified privilege to peer review committee members and in any action involving the peer review process the plaintiff has the burden to adduce by clear and convincing proof that the defendant members of the peer

review committee were "motivated by malice and not by an otherwise proper purpose." (Appendix H, Section 663-1.7, Haw. Rev. Stat.). The By-laws of Kapiolani provide similar immunity, excluding acts done with malice and without good faith.

Based on the record, the Supreme Court found no supporting evidence of malice or lack of good faith on the part of Kapiolani or members of its peer review committees.

In the Petitioners' Writ of Certiorari, at pages 60-61, the Petitioners note that the Hawaii Supreme Court did not specifically include within its decision on Section 663-1.7, Haw. Rev. Stat., that Queen's Medical Center or any of the individual respondents was immune from civil liability under Section 663-1.7, Haw. Rev. Stat., but only found Kapiolani and its named defendants were so immune. From this the Petitioners conclude that since Queen's

Medical Center was not specifically referred to in the state Supreme Court's Memorandum Opinion, the Petitioners now argue that the state Supreme Court found that "apparently Queen's Medical Center [was] not immune." (Appendix B-11 to B-13).

Petitioners' argument is patent nonsense. The Petitioners raised this point in their Motion for Reconsideration filed with the Hawaii Supreme Court (Petitioners' Writ of Certiorari, pp. 60-61). The argument was so utterly frivilous that the Hawaii Supreme Court denied the Petitioners' Motion for Reconsideration without argument. (Appendix C).

The Petitioners also raise certain issues with respect to the interpretation of Chapter 663-1.7, Haw. Rev. Stat. (Petitioners' Writ of Certiorari, pp. 57-64). None of these arguments raise a single federal issue reviewable by way of this Court's appellate jurisdiction. All of the

questions raised with respect to the peer review statute could have been argued to the Circuit Court and, on review, to the Hawaii Supreme Court. The Hawaii Supreme Court disposed of all of the issues properly raised and observed that the Petitioners did not raise "by clear and convincing evidence" the issues whether or not the Peer Review Committee members acted with malice and without good faith and hence had failed to state a claim upon which relief could be granted.

The explanation for the absence of any reference to Queen's Medical Center in the state Supreme Court's Memorandum Opinion dealing with Section 663-1.7, Haw. Rev. Stat., where only Dr. Hattori and Kapiolani were discussed, is that the Petitioners never properly alleged that any of Queen's Medical Center's personnel acted with malice or in bad faith. In fact, as the Hawaii Supreme Court found with respect to the Petitioners' challenge to the Queen's Medical Center's

peer review process, the only basis for these allegations were "Dr. Tun's personal inclination or views" which were found "insufficient grounds" to support the Petitioners' contentions. In short, the Petitioners' arguments with respect to Chapter 663-1.7, Haw. Rev. Stat., are made up out of whole cloth and are matters of state law which were raised and disposed of by the Hawaii Supreme Court. Many of the issues raised by Petitioners were decided by the Hawaii Supreme Court on independent and adequate state substantive and procedural grounds and are not reviewable by this Couret. The Petitioners have neither raised nor created any federal or constitutional issue with respect to the Hawaii Supreme Court's interpretation and disposition of the Chapter 663-1.7, Haw. Rev. Stat. allegations.

IV. CONCLUSION

Based on the above, the Queen's Medical Center and the individual Respondents

submit that this Court should deny the Petitioners' Writ of Certiorari.

Respectfully submitted,

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